



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 11, 1996

Ms. Christine T. Rodriguez
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-1122

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40156.

The Texas Department of Insurance (the "department") received a request for information seeking

1. individuals who paid for new life insurance policies by financing them through existing whole life policies;
 - a. the names and addresses of those individuals;
 - b. the agents who sold those policies and/or serviced them;
 - c. any cases which have been filed against Prudential for "insurance churning," please include the cause numbers and location of where such suits were filed or which are currently pending (regardless of whether such cases were filed in Texas);
2. provide any documents which would show the organizational structure of Prudential Insurance Company;
3. any documents which show that Prudential Insurance Company or any of its agents have violated any Insurance Board Regulations;

4. any documents which show that Prudential Insurance Company or any of its agents have violated sections 21.3-4 of chapter 28 of the Texas Administrative Code; and
5. any documents which show that Prudential Insurance Company has violated federal Securities Acts of 1933 or 1934.

Although you state that you are providing the requestor with some of the requested information, you claim that the remaining information is excepted from required public disclosure pursuant to section 552.103 of the Government Code. You also state that the company which submitted some of the requested information, Prudential Insurance Company ("Prudential"), may have a proprietary interest in the information.¹ Thus, you ask this office for an decision under section 552.305(a) of the Government Code. Prudential has submitted a brief to this office arguing that two categories of the requested information are excepted from disclosure. You have submitted a representative sample of the requested information to this office for review.²

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must

¹ The department explains that Prudential provided the department with the information pursuant to an inquiry under article 1.24 of the Insurance Code.

² In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You state that the department is currently investigating Prudential for alleged violations of state insurance laws. You state that if violations are discovered, the investigation would "culminate in an administrative contested case." After reviewing the documentation and materials submitted to this office for review, we conclude that litigation is reasonably anticipated. We also conclude that the requested documents relate to the anticipated litigation. You may, therefore, withhold the requested information from disclosure under section 552.103.³

We note, however, that generally once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). In this instance, there appear to be requested documents that were provided to the department by the potential opposing party, *e.g.*, the list of names, addresses, and agents of those individuals who paid for new life insurance policies by financing them through existing whole life policies, and the organizational structure of Prudential. Thus, we will address Prudential's arguments against disclosure.

Prudential argues, in its brief to this office, that two categories of information are excepted from public disclosure: (1) Prudential's internal complaint logs and (2) reports which list the names, addresses, and agents of those individuals who paid for new life insurance policies by financing them through existing whole life policies. After examining the request for information and the documents submitted by the department, it does not appear that the requestor has asked for Prudential's complaint logs. Thus, this information need not be released.

As to the report that contains the names, addresses, and agents of those individuals who paid for new life insurance policies by financing them through existing whole life policies, Prudential argues that this information is excepted from required public disclosure pursuant to sections 552.101, 552.103, and 552.110 of the Government Code.

Section 552.110 excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

³ The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.⁴

In this instance, Prudential argues that under the supreme court's test in *Hyde Corp.*, the report listing the names, addresses, and agents of those individuals who paid for new life insurance policies by financing them through existing whole life policies is a trade secret. Prudential argues the six factors outlined above and asserts that the report is a customer list. After reviewing the submitted sample and Prudential's arguments, we conclude that Prudential has made a *prima facie* showing that the information contained within the report constitutes a trade secret. Open Records Decision Nos. 552 (1990); 255 (1980). Thus, the department must withhold this information.⁵

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

⁵ Because we are able to make a determination under section 552.110, we do not consider the other exceptions raised by Prudential.

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 40156

Enclosures: Submitted documents

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